IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 108 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KIRITKUMAR BUDHALAL PATEL

Versus

STATE OF GUJARAT

Appearance:

MR BP GUPTA for Petitioners

MR KC SHAH, APP for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 05/10/2000

ORAL JUDGEMENT

1. This revision is directed against the order dated September 26, 1997 of 2nd Jt.Civil Judge (J.D.) & J.M.F.C., Gandhinagar, rejecting the application of the revisionist for dropping proceedings initiated against

him under the Prevention of Food Adulteration Act.

2. Shri BP Gupta, learned counsel for the revisionist and Shri KC Shah, learned APP have been heard.

3. The application (Annexure-B) was moved by the revisionist before the trial Magistrate that, since the revisionist was being prosecuted for misbranding tobacco and since the rule relating to misbranding, as contained in rule 32(e) of the Prevention of Food Adulteration Rules has been declared by the Apex Court in Dwarka Nath v. Delhi Municipality AIR 1971 S.C. p.1844 as ultra vires, the proceedings against the revisionist were liable to be dropped, and since the learned Magistrate did not do so, he committed illegality, requiring interference in this revision. The impugned order shows that the learned Magistrate, on principle, accepted the Apex Court's verdict in the case of Dwarka Nath v. Delhi Municipality (Supra) but, observed that the case before him stood on different facts and, without recording evidence he can not discharge the accused under sec.245(2) of the Criminal Procedure Code. In support of his view, he has placed reliance upon Balwantbhai Dharamsingbhai Varia v. Rajnikant Gordhanbhai Patel & Ors. 1993 GLR p.463.

4. It is informed by Shri BP Gupta that charges have not been framed against the revisionist, so far. On these facts, it has to be seen, whether the learned Magistrate could have discharged the accused under sec.245(2) of the Criminal Procedure Code.

Sec.245(2) provides that, "nothing in this section shall be deemed to prevent the Magistrate from discharging the accused at any previous stage of the case, if for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

Sub sec.(1) of Sec.245 however applies to cases where the Magistrate records statements under sec.244 of the Criminal Procedure Code and considers, for reasons to be recorded by him that no case against the accused has been made out, which, if unrebutted, would warrant his conviction and, in that case, he can discharge the accused.

5. As such, on the facts of the case, sec.245(1) was not attracted. Sec.245(2) of the Code of Criminal

Procedure could be applied by the Magistrate if he found for reasons to be recorded by him that the charge will be groundless. On the contention of Shri Gupta, the charge could be said to be groundless in view of the Apex Court's verdict in Dwarka Nath v. Delhi Municipality (Supra) wherein, the Supreme Court has clearly held that rule 32(e) framed under the Prevention of Food Adulteration Act is invalid and ultra vires. If this is the situation then, even under sec.245(2) of the Criminal Procedure Code, the learned Magistrate could have discharged the accused by observing that, since that rule has been declared invalid and ultra vires, framing of charge for violation of that rule would be to proceed on a groundless charge. However, Shri Shah, learned APP has pointed out that rule 32(e), which was interpreted by the Apex Court in Dwarka Nath v. Delhi Municipality (Supra) was altogether different and, the old rule has been substituted by the new rule 32(e). It is, therefore, desirable to have comparative study of rule 32(e), as it stood prior to April 30, 1989 and thereafter. Rule 32(e) as it stood before April 30, 1989 reads as under :

"Rule 32(e) - A batch number or code number either in Hindi or English numericals or alphabets or in combination."

Rule 32 in its entirety is substituted by Notification No.GSR 422(A) dated April 29, 1987 w.e.f. April 30, 1989. The amended rule 32(e) now reads as under :

Rule 32(e) - A distinctive batch number or lot number or code number, either in numericals or alphabets or in combination, the numericals or alphabets or their combination, representing the batch number or lot number or code number being preceded by the words Batch No., or Batch, or Lot No., or Lot or any distinguishing prefix."

6. Thus, on a plain reading of these two rules as they stood prior to April 30, 1989 and subsequent thereto, indicate that the two rules are not identical.

7. Shri Gupta has argued that, even the amended rule does not make any substantial change, and in view of the Apex Court's verdict in Dwarka Nath v. Delhi Municipality (Supra), no purpose would be served to the public or the consumer or the purchaser of food article, if batch number or lot number is not given on the food article. The question for consideration, however is, whether the learned Magistrate was justified in not blindly following the Apex Court's verdict in case of

Dwarka Nath v. Delhi Municipality (Supra) - more particularly when the said rule 32(a), as considered by the Apex Court to be ultra vires, was subsequently amended and substituted by new rule 32(e).

8. In the instant case, the date of offence is December 21, 1993 and, at that time the amended rule 32(e) was in operation. I am afraid, if the learned Magistrate could have held, taking guidance from the Apex Court's verdict in Dwarka Nath v. Delhi Municipality (Supra) that, even the amended rule 32(e) after 1989 is ultra vires. That was not within the competence of the learned Magistrate. Even, this revisional Court can not so hold because, in the present system of allotment of business, the vires of a particular act or rule, or a particular portion of an act or rule can be examined only by the Division Bench and not by the Single Judge of this Court, exercising revisional jurisdiction. Consequently, this Court is unable to accept the contention of Shri Gupta that the verdict of the Apex Court in Dwarka Nath v. Delhi Municipality (Supra) applies to amended rule 32(e) as well, and the said amended rule has become ultra vires or is invalid, unless either by the Apex Court or by a Division Bench of this Court the amended rule 32(e) is held to be ultra vires. This Court, sitting on the revisional side and exercising revisional jurisdiction, can not hold that the amended rule is ultra vires. If the amended rule, on the facts and circumstances of the case, can not be said to be ultra vires, the impugned order of the learned Magistrate can not be said to be illegal or invalid for the obvious reason that, in face of existence of rule 32(e), as amended up-to-date, it cannot be said that the charge of misbranding within the meaning of rule 32(e) is groundless. If the charge cannot said to be groundless, the learned Magistrate could not have discharged the revisionist under sec.245(2) of the Criminal Procedure Code.

9. As such, I am of the opinion that, the learned Magistrate did not commit any illegality in passing the impugned order. The revision is, thus, without merits and is liable to be dismissed. The revision is hereby dismissed.

October 5, 2000. (D.C. Srivastava, J.)

/sakkaf